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No. 88-1595
No. 88-1771

In The

# Supreme Court of the United States

October Term, 1989

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR JR.), and BARBARA K. CLISBY,

*Cross-Petitioners,*

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

*Cross-Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## MOTION OF CROSS-PETITIONERS, BONJORNO, ET AL. TO OPEN ORAL ARGUMENT AND, IN SUPPORT THEREOF, TO PRESENT TO THE COURT A SUMMARY OUTLINE OF ISSUES AND THEIR POSITION FOR USE IN DETERMINING THE ORDER OF ORAL ARGUMENT, UNDER SUPREME COURT RULE 38, AND TO FACILITATE QUESTIONING BY THE COURT AT ORAL ARGUMENT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

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| JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR), and BARBARA K. CLISBY, Cross-Petitioners | : | No. 88-1595 (Kaiser's Petition) |
| vs. | : | No. 88-1771 (Plaintiffs' Cross-Petition) |
| KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., Cross-Respondents | : | (Consolidated for Purposes of Oral Argument on December 4, 1989) |

**MOTION OF CROSS-PETITIONERS, BONJORNO, ET AL. TO OPEN ORAL ARGUMENT AND, IN SUPPORT THEREOF, TO PRESENT TO THE COURT A SUMMARY OUTLINE OF ISSUES AND THEIR POSITION FOR USE IN DETERMINING THE ORDER OF ORAL ARGUMENT, UNDER SUPREME COURT RULE 38, AND TO FACILITATE QUESTIONING BY THE COURT AT ORAL ARGUMENT**

Cross-Petitioners, Joseph A. Bonjorno, et al. ("Plaintiffs"), by their attorneys, Duane, Morris & Heckscher, and Henry T. Reath, senior counsel (who will present oral argument on their behalf), respectfully move Your Honorable Court to be permitted to open oral argument.

Plaintiffs seek leave to file with the Court the Summary Outline of Issues and Their Position, attached as Exhibit A:

¶ to assist the Court in determining, under Supreme Court Rule 38, which party will open argument on these Cross-Petitions;

- ¶ to facilitate the identification of issues and the positions of the parties in advance of oral argument; and
- ¶ to serve as a resource at oral argument to facilitate questioning by the Court.

In support of this Motion, Counsel for Plaintiffs states as follows:

1. On June 19, 1989 this Court granted the Cross-Petitions for Certiorari of Defendant Kaiser ("Defendant") and Plaintiffs, which have been consolidated for oral argument on December 4, 1989. Supreme Court Rule 38 provides that where there are Cross-Writs, "the Court will advise the parties which one is to open and close [oral argument]."

2. At issue on these Writs is the power of Courts of Appeals to award appropriate interest to a plaintiff, over an appropriate time period, to preserve the value of its award during delays in the judicial process where an initial damage award is recalculated at a later date and recovery is further delayed by post-trial motions and appeals.

3. Plaintiffs respectfully request that their Counsel be permitted to open oral argument, since the ultimate issue that this Court must address – the power of the Courts of Appeals to award appropriate interest (under Federal Rule of Appellate Procedure 37, as reinforced by equitable and inherent powers) – is presented in Plaintiffs' Cross-Petition.

4. Because of the volume of briefing and opinions on the issues presented (as noted below), and in support of this Motion, Counsel for Plaintiffs move to submit the



attached Summary Outline for use by the Court in determining, under Supreme Court Rule 38, the order of Oral Argument, and additionally, as a resource for the Court and Plaintiffs' Counsel, to facilitate questioning by the Court at oral argument.

5. This is a long and complex case, now in its sixteenth year, suit having been started in January, 1974. It has been heard before three juries, two different District Court judges, and has been before the United States Court of Appeals for the Third Circuit four times on appeals and once on a Writ of Mandamus. This Court had previously denied the Defendant's two prior Petitions for Certiorari filed in 1978 and 1985 before granting a Writ on the present Cross-Petitions.

The opinions on interest in the District Court and the Court of Appeals consist of a total of 77 reproduced pages, and Cross-Petitions for Certiorari and Replies, another 113 pages. Additionally, both sides have each filed three briefs for a total or an additional 211 pages.

6. Counsel for Plaintiffs earnestly believes and respectfully states to Your Honorable Court that, because of the importance of these issues and the extensive record and briefs, the attached Summary Outline serves several important purposes:

*First*, it will be of assistance to the Court under Supreme Court Rule 38 in determining the order of presenting opening arguments;

*Second*, it provides in one single, short document, a resource for the Court that identifies all the issues;

*Finally,* at oral argument, it will allow Plaintiffs' counsel to more effectively "emphasize and clarify the written argument appearing in the briefs theretofore filed," as provided under Supreme Court Rule 38 and will provide an effective way to save time and respond to questions by the Court.[1]

7. The attached Summary Outline is only a summary of the basic positions stated in Cross-Petitioners' three briefs, with footnotes that are cross-referenced to the briefs filed and opinions below. The Summary Outline contains no discussion, arguments or citation of cases not contained in Cross-Petitioners' three briefs filed with this Court.

Respectfully submitted,

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[1] Counsel is well aware that *"[t]he Court looks with disfavor on any oral argument that is read from a prepared text."* S.Ct.R. 38 (emphasis in original). The submission of the Summary Outline will allow counsel to avoid any lengthy oral summary and focus on responding to the specific concerns of the Court.

EXHIBIT "A"

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

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SUMMARY OUTLINE
OF
ISSUES AND POSITION OF CROSS-PETITIONERS
(Plaintiffs and Appellants below)

[Footnote references to briefs and court opinions are attached at the end of this outline.]

## I. PRINCIPAL ISSUE BEFORE THE COURT:

In 1979, Kaiser's liability was established for having destroyed Plaintiffs' business. The amount of that liability was ultimately determined to be $9.5 million.

Since 1979, Kaiser has benefitted from the use of Plaintiffs' $9.5 million in an amount in excess of $18.6 million and has deprived Plaintiffs of that time value of money.

Plaintiffs seek an allowance of interest that will return to them that $18.6 million, whereas Kaiser seeks to retain the entire sum, except for one day's worth of interest.

## II. PROCEDURAL HISTORY:

These are cross-petitions, by Plaintiffs and Defendant below, from an award of interest, on an underlying treble damage anti-trust award.

These appeals on which cross-writs were granted arose from Plaintiffs' 1986 Petition to the Court of Appeals for the Third Circuit for an allowance of interest, pursuant to Federal Rule of Appellate Procedure 37.[1]

## III. THE TWO ISSUES BEFORE THE COURT: (1) TIME PERIOD AND (2) RATE OF INTEREST TO BE AWARDED.

### 1. TIME PERIOD During Which Interest Runs.

Where the Court of Appeals:

a) entered judgment in 1984,

b) reinstating a damage judgment entered in 1981,

c) that was based on a liability judgment in 1979, which the 1984 judgment also affirmed;

And where this Court denied certiorari in 1986,

When does interest begin to run?

a) From 1986 (after this Court denied certiorari on the substantive issues and Kaiser paid $9.5 million) as contended by defendant Kaiser?[2]

b) From 1981 (when the damages were fixed by the jury) as found by the Court below?[3]

c) From 1979 (when the liability judgment was entered) as Plaintiffs contend?[4]



III (continued)

### 2. RATE OF INTEREST TO BE AWARDED.

**a) Courts of Appeals' Power to Award Appropriate Interest.**

Do Courts of Appeals have power – as Plaintiffs contend[5] – to award an appropriate sum of interest, to preserve a damage award against loss in value, during delays in the courts?

Plaintiffs seek commercial market rate interest, monthly average prime, compounded monthly.[6]

**b) The Federal Interest Statute for Calculating Interest on District Court Judgments.**

If the sole authority for the Courts of Appeals to award interest is prescribed by the federal statute for calculating interest on District Court judgments (as found by the Court below and disputed by Plaintiffs)[7]

What statute applies?

1. The Repealed Statute, 28 U.S.C. §1961, in effect when the judgment was first entered (1979) – as found by the District Court[8] and contended here by Kaiser?[9]

   This statute provided for interest under state law (which Kaiser contends is 6% simple under Pennsylvania law)[10]

   or

2. The Current Statute, 28 U.S.C. §1961 as amended in 1982,[11] which was in effect when Plaintiffs' right to interest matured into a recoverable right (1986)[12] – as found by the Court below?[13]

   This statute provides for a fixed, non-fluctuating Treasury Bill rate compounded yearly.

## IV. PLAINTIFFS' POSITION ON TIME PERIOD

**Interest Should Run From The Date Liability Was Established (1979) Where The Final Award Of Damages Was Based On Facts Established In That Liability Finding.**

1. The 1979 judgment was composed of 2 parts:

   a) The jury's verdict of liability which was never set aside, and which provided the factual basis for the 1981 damage award in an increased amount[14]

   and

   b) The damage award (which was set aside for a new trial limited to recalculation of damages as of 1977).

   Thus interest should run from the date when it was first judicially determined (1979) that defendant had intentionally damaged Plaintiffs.[15]

2. **Liquidated v. unliquidated damages:** The statements by the Court below that interest cannot run on an unliquidated amount[16] were in error and contrary to rulings of this Court.[17]

3. **Changes in amount of damages only:**

   a) Decrease in amount. This Court has held in *De La Rama* and other cases[18] that where the amount of recovery is reduced on appeal, interest runs on the recalculated amount from the original date when liability was established.

   b) Increase in amount. A fortiori, when the amount is increased, interest should run from the original date of liability.[19]

   The overwhelming majority of decisions by lower courts have so held.[20]



IV (continued)

4. **Stopping or reducing the running of interest:** Once liability was established, or at any time thereafter, defendant Kaiser could have stopped or reduced the running of interest by: (1) tendering into court;[21] or (2) paying Plaintiffs what it believed it owed.[22]

5. **The equities and four-fold purposes of interest reinforce Plaintiffs' position:**[23]

   a) Defendant has had the use of Plaintiffs' money since their liability was determined in 1979;

   b) Plaintiffs have been deprived since that date of the value of their award by an amount equal to defendant's benefit;

   c) Public Policy: It is against sound public policy and efficient court administration to allow and encourage parties to benefit financially from delays, while they exhaust their post-judgment judicial remedies.[24]

6. **Judicial errors or delay:** But for errors in law, or delays by the District Court judges in this case, Plaintiffs would have recovered their treble damage award as early as:

   a) 1977, (long before the date they are now claiming interest should begin to run), had the first judge not mistakenly directed a verdict for defendant;[25] or at least

   b) late 1979, had the second judge, instead of delaying two years,[26] promptly decided defendant's post-trial motions and scheduled the re-trial on damages

## V. PLAINTIFFS' POSITION ON RATE TO BE AWARDED

### A. Courts Of Appeals Have Power To Award Appropriate Interest To Preserve The Value of Their Orders, Judgments Or Awards They Reinstate.

1) **Policy considerations**: To vindicate the four-fold purposes of interest,[27] Courts of Appeals cannot be denied the power (inherent and/or equitable) to award appropriate interest on their judgments, or those they reinstate.[28]

2) **Sound Judicial Administration – Eliminate incentives for gain from delay**: Sound judicial administration requires that the courts be able to eliminate incentives for delay and financial gain by litigants exhausting their judicial remedies, where the interest awarded against them would be less than the time value of money.[29]

   This consideration was first recognized by the President of the United States in early 1979,[30] and later by the Congress in 1982, when it amended the old statute (28 U.S.C. §1961) for District Court judgments.[31]

3) **Rule 37 and §1912 Power**: The Courts of Appeals have power to award appropriate interest pursuant to Fed.R.App.P. 37 and 28 U.S.C. §1912.[32]

4) **Rule 37 and §1912 power – no conflict with federal District Court interest statute**: The Courts of Appeals' power to award appropriate interest (commercial market rates) does not conflict with the §1961 which is designed as a rule of convenience for calculating interest on judgments routinely entered in District Courts.[33]



V.A.4 (continued)

   28 U.S.C. §1961 as amended, subsection (c)(4), by its terms specifically does not "affect the interest on any judgment of any court not specified in this section."[34]

5) **Equitable and inherent power**: This Court has recognized that Courts of Appeals possess equitable[35] and inherent[36] powers to award appropriate interest[37] to do justice among the parties.

6) **Shortcomings of the Federal District Court Interest Statute**: The Court's power to award interest under Fed.R.App.P. 37 and 28 U.S.C. §1912 provides an important remedy to Courts of Appeals, because of major shortcomings in the statute for District Court judgments, 28 U.S.C. §1961.

   This is particularly so in long delays occasioned by the appeals process, where interest is awarded on reinstated or altered judgments over periods during which the Plaintiff is precluded from collecting on the judgment:

   First, §1961, being a rule of convenience, uses a fixed, rather than a floating rate – at Treasury Bill rates (2-3 points below prime) and compounded only yearly.[38] This difference in rates and compounding results in a significant shortfall from commercial market rates faced by business litigants.[39]

   Second, using the fixed rate can result in arbitrary and erratic swings. For example, in this case, as little as a 2 day difference in fixing the rate can cause a swing of as much as $4 million in interest.[40]

V.A (continued)

7) **Appropriate interest – commercial market rates**: The Court below should have exercised its power to award commercial market rates (prime, compounded monthly)[41] because:

a) Defendant's benefit: Defendant had the use of Plaintiffs' money since 1979, at market rates (in excess of $18.6 million).[42]

b) Plaintiffs' loss: Plaintiffs' cost of money was 2.5 points over prime, compounded monthly.[43]

Furthermore, had Plaintiffs received and invested the sums owed when due – not at Treasury Bill or savings account rates (as contended by defendant),[44] but in well-established, respected balanced or growth stock fund – the award could have appreciated to a sum worth today from 34 to 120 million dollars.[45]

B. **Defendant's Contentions That The Old, i.e., Repealed Version Of 28 U.S.C. §1961 (That Looks To State Rates) Applies To This Case Are Without Merit:**

1. **Appellate Court Power to Award Adequate Interest:** As discussed above, 28 U.S.C. §1912, Fed.R.App.P. 37, and the inherent and equitable powers of the courts mandate an award of interest adequately measuring the time value of money.[46]

2. **No retroactivity issue:** There is no issue of retroactive application of any law, as defendant contends,[47] where the right to recover is not determined (1986) until after the amended law takes effect (1982).[48]



V.B (continued)

3. **The *Bradley* Rule – Irrelevant:** The *Bradley* rule applying current law is not relevant where there is no change in law from the date of vesting to the date of decision (i.e. where the right to recover interest does not arise until after the amended law takes effect).[49]

4. **The *Bradley* Rule, if applicable:** would mandate following current law since defendant has not established a Congressional intent not to apply the repealed law, or manifest injustice if current law is applied.

a) No Congressional intent: No statutory direction or legislative history suggests that current law should not be applied.[50]

b) No manifest injustice: defendant's claims of manifest injustice are insufficient in law,[51] and devoid of facts[52] to support any such findings.

## NOTES TO CROSS-PETITIONERS' OUTLINE

[1] Opinion of the Court of Appeals for the Third Circuit below, reprinted in Kaiser Petition for a Writ of Certiorari in No. 88-1595 ("Kaiser Pet.") A-7, 865 F.2d at 568; Brief for Respondents on Kaisers' Petition in No. 88-1595 ("Plaintiffs' Red Br.") at 5 & n.5; Reply Brief for Plaintiffs as Cross-Petitioners in No. 88-1771 ("Plaintiffs' Yellow Br.") at 12 & n.19.

The briefs filed in this Court are referred to as Kaiser's or Plaintiffs' "Blue," "Red" or "Yellow" to denote the color of each brief's cover pursuant to Supreme Court Rule 33.

[2] Brief for Petitioners in No. 88-1595 ("Kaiser Blue Br.") at 42.

[3] Kaiser Pet. A-14, 865 F.2d at 872; Plaintiffs' Blue Br. at 35-36.

[4] Plaintiffs' Blue Br. at 17-30; Plaintiffs' Yellow Br. at 2-11.

[5] Plaintiffs' Blue Br. at 14-15, 31-41; Plaintiffs' Yellow Br. at 11-15.

[6] Plaintiffs' Blue Br. at 7 n.11, 17, 41-45 & nn.71-72, 47; Plaintiffs' Yellow Br. at 17 & n.29, 19.

[7] Kaiser Pet. A-14 n.11, 865 F.2d at 872 n.10; *cf.* Plaintiffs' Blue Br. at 32-36.

[8] Kaiser Pet. A-45-50.

[9] Kaiser's Blue Br. at i.

[10] Kaiser Pet. A-15 n.12; 865 F.2d at 572 n.11.

[11] Kaiser Pet. A-23, 865 F.2d at 576.

[12] Plaintiffs' Red Br. at 14-20.

[13] Kaiser Pet. A-17-22, 865 F.2d at 573-76.

[14] Plaintiffs' Blue Br. at 3-5; Plaintiffs' Yellow Br. at 2-5.

[15] Plaintiffs' Blue Br. at 17-26 & nn.34, 36; Plaintiffs' Yellow Br. at 2-3, 6-9.

[16] Kaiser Pet. A-11, 12 & n.7, 865 F.2d at 570, 571 & n.6.

[17] Plaintiffs' Blue Br. at 19 & n.26; *Funkhouser; De La Rama; see also* Plaintiffs' Blue Br. at 27-28 (*Handgards*); *id.* at 29-30 (cases on changes in amount of award); Plaintiffs' Yellow Br. at 6-9 & nn.14-15.



[18] Plaintiffs' Blue Br. at 18-19 & n.25; Plaintiffs' Yellow Br. at 6-9.

[19] Plaintiffs' Blue Br. at 29-30; Plaintiffs' Yellow Br. at 6-7.

[20] Plaintiffs' Blue Br. at 24-25 n.36; Plaintiffs' Yellow Br. at 8-9 nn.14-15; *see also* Plaintiffs' Blue Br. at 20-22 & nn.31-32.

[21] Plaintiffs' Blue Br. at 5, 20 & n.29, 46; Plaintiffs' Red Br. at 3, 4-5 & n.4, 41 & n.49; Plaintiffs' Yellow Br. at 3 n.8.

[22] Plaintiffs' Red Br. at 3, 4-5, 41; Plaintiffs' Yellow Br. at 3 & n.8.

[23] Plaintiffs' Blue Br. at 13-17; Plaintiffs' Red Br. at 42-43; Plaintiffs' Yellow Br. at 1: the purposes of interest are to

- ¶ preserve judgments against diminution;
- ¶ prevent unjust enrichment of defendant at plaintiff's expense;
- ¶ vindicate the congressionally mandated policy to preserve free trade; and
- ¶ eliminate incentives for court delay after adverse judgments.

[24] Plaintiffs' Blue Br. at 16 & n.22, 43 n.70, 46; Plaintiffs' Red Br. at 42-43; Plaintiffs' Yellow Br. at 18.

[25] Plaintiffs' Blue Br. at 3, 18 n.23.

[26] *Id.* at 5 n.8; Plaintiffs' Yellow Br. at 4-6 & n.10.

[27] *See supra* n.23.

[28] Plaintiffs' Blue Br. at 31-41; Plaintiffs' Yellow Br. at 11-15.

[29] Plaintiffs' Blue Br. at 13, 16-17, 25-26, 33-34, 42-45; Plaintiffs' Yellow Br. at 18.

[30] Plaintiffs' Red. Br. at 34 n.39.

[31] *Id.* at 34.

[32] Plaintiffs' Blue Br. at 36, 40-41; Plaintiffs' Yellow Br. at 12 & nn.19-20.

[33] Plaintiffs' Blue Brief at 8, 35-36 & n.54, 38, 44; Plaintiffs' Yellow Br. at 12.

[34] Plaintiffs' Blue Br. at A-2; Plaintiffs' Yellow Br. at 12, 18.

[35] Plaintiffs' Blue Br. at 14-15, 36-40; Plaintiffs' Yellow Br. at 13 & n.21.

[36] Plaintiffs' Blue Br. at 14-15, 32-35; Plaintiffs' Yellow Br. at 13 & n.21.

[37] Plaintiffs' Blue Br. at 41-46; Plaintiffs' Yellow Br. at 15 & n.25.

[38] Plaintiffs' Blue Br. at 42-44.

[39] *Id.* at 8 & n.14; Plaintiffs' Yellow Br. at 16-18.

[40] *Id.* at 44 n.72; Plaintiffs' Red Br. at 48-49; Kaiser's Blue Br. at 10.

[41] The Court of Appeals below, without discussing Plaintiffs' request for market rate interest, dismissed it in a footnote as being "without merit." Kaiser Pet. A-14 n.11, 865 F.2d at 572 n.10.

[42] Plaintiffs' Blue Br. at 8 & n.14, 45; *see also* Plaintiffs' Yellow Br. at 16-17.

[43] J.A. 290-91; Plaintiffs' Blue Br. at 7 n.11; Plaintiffs' Yellow Br. at 16 & n.28.

[44] Kaiser's Red Br. at 16, 30.

[45] Plaintiffs' Yellow Br. at 2, 16 & n.28.

[46] Plaintiffs' Blue Br. at 47; Plaintiffs' Red Br. at 49.

[47] Kaiser's Blue Br. at 13-24.

[48] Plaintiffs' Red Br. at 14-20, 28-30.

[49] *Id.* at 14-15.

[50] *Id.* at 30-34.

[51] *Id.* at 35-42.

[52] *Id.* at 39-40.